No. 22,611

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 2 2 1968

UNITED STATES OF AMERICA,

Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF BREMERTON,
A PUBLIC BODY POLITIC AND CORPORATE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

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I N D E X

CITATIONS

Cases:

Cases (continued):

Statutes:

Miscellaneous:

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JURISDICTIONAL STATEMENT

This action was brought by the United States pursuant to the Medical Care Recovery Act, 42 U.S.C. 2651, to recover the value of certain medical care furnished by the United States. The district court, by order of December 5, 1967, dismissed the action (R. 48). On February 2, 1968, the United States filed a notice of appeal (R. 49). This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Roger B. Thomas, an enlisted man in the United States Navy, lived with his wife and their 18-month-old daughter Carrie in the West Park housing project in Bremerton, Washington. The housing project was in the possession and under the control of the defendant-appellee, the Housing Authority of the City of Bremerton and Roger Thomas had leased an apartment from the Authority.

On July 17, 1963, during the regular lease term, Carrie Thomas opened the hot water faucet in the bathroom sink and the outflow of water at a high temperature severely burned her. Because Carrie was the minor dependent daughter of an enlisted man on active duty in the Navy, the United States was required by law to furnish, and did furnish, hospital, medical, and surgical care for treatment of the injuries caused by the scalding water.

On September 5, 1963, Carrie Thomas, by her guardian ad litem, Robert B. Thomas, brought suit in the Superior Court of the State of Washington against the Housing Authority. [1/] After a trial, the jury found that the accident had been caused by the negligence of the Housing Authority, and on June 7, 1965, the Superior Court entered judgment in favor of Carrie Thomas for

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1/ This lawsuit was Cause No. 44055, in the Superior Court of the State of Washington in and for the County of Kitsap (R. 32).

$50,000. The judgment noted that the court had "rejected during the trial the plaintiff's offer of proof as to the reasonable value of hospital and medical services rendered the minor plaintiff", and went on to state that the award of damages did not include "any hospital or medical expenses rendered the minor plaintiff by any United States Government operated hospital" (R. 32-33). The judgment of the Superior Court was affirmed by the Supreme Court of Washington on April 13, 1967 in Thomas v. Housing Authority of the City of Bremerton, 71 Wash. 2d 67, 426 P. 2d 493.

On September 21, 1965, the United States filed its complaint in the United States District Court in the present action, seeking, pursuant to the Medical Care Recovery Act, 42 U.S.C. 2651, to recover the reasonable value of the care and treatment afforded by it to Carrie Thomas (R. 1-2). The defendant Housing Authority answered, and the parties stipulated that the reasonable value of the care and treatment furnished by the United States to Carrie Thomas was $3,275 (R. 5, 29-30).

On December 5, 1967, the court ruled (1) that the United States should have intervened in the state court action brought by Thomas on his daughter's behalf within six months after the United States had first furnished medical care, and (2) that the failure of the United States to intervene barred it from bringing the present action against the Housing Authority (R. 47-48).

STATUTE INVOLVED

The Medical Care Recovery Act, 42 U.S.C. 2651-2653, provides in pertinent part:

§ 265. Recovery by United States -- Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment

(a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished

by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

* * *

SPECIFICATIONS OF ERROR

1. The district court erred in holding that the United States was barred from bringing this action because of its failure to intervene in the earlier action brought against the tortfeasor by the injured party within six months of the date medical care was first furnished by the United States.

2. The district court erred in refusing to hold on the present record that the United States was entitled to judgment of $3,275.

SUMMARY OF ARGUMENT

I

Congress enacted the Medical Care Recovery Act to give the United States an independent right to recover from third-person tortfeasors the cost of the medical care it furnishes to persons injured under circumstances creating a tort liability upon such third persons. The district court misconceived the effect and purpose of 42 U.S.C. 2651(b) in reading that subsection so as to forfeit the independent right of the United States to reimbursement under the Act merely because it failed

to require the United States to join in the earlier action brought by the injured party against the tortfeasor.

II

The Housing Authority fully concedes that the United States was required by law to furnish medical care to the injured person, that her injuries had arisen under circumstances establishing liability of the Housing Authority to pay damages for those injuries, and that the fair value of the medical care furnished by the United States was $3,275. Accordingly, the district court plainly erred in failing to enter judgment for that sum in favor of the United States, since the Housing Authority has admitted all of the operative facts necessary for recovery under the Medical Care Recovery Act.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PRESENT SUIT WAS BARRED BECAUSE THE UNITED STATES HAD FAILED TO INTERVENE IN THE INJURED PERSON'S STATE COURT ACTION.

A. The Act Gives The United States An Independent Right To Reimbursement.

Congress enacted the Medical Care Recovery Act in response to the Supreme Court's 1947 decision in United States v. Standard Oil Company, 332 U.S. 301. In that case, the United States sought to recover for hospitalization and medical care furnished to a soldier injured as a result of the negligent operation of a Standard Oil Company truck. The United States contended that

the company was liable in damages to it for interference with the Government-soldier relationship and the consequent loss to it.

The Court refused to impose such a liability, noting that it was the function and responsibility of Congress to prescribe such liability on the part of the tortfeasors to the United States for medical expenses. In its opinion, the Court also significantly noted that the United States' claim was "not one for subrogation", but was "rather for an independent liability owing directly to itself as for deprivation of the soldier's services and 'indemnity' for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by [the company]." 332 U.S. at 304, note 5. It recognized that "the United States has power at any time to create the liability", 332 U.S. at 316, and agreed that the creation and regulation of such a liability would not be determined by state law. 332 U.S. at 306. The Court viewed the issue as coming "down in final consequence to a question of federal fiscal policy", and, as already noted, in refusing "to make the determination that liability exists", held that that decision was for the Congress, not for the courts. 332 U.S. at 314, 316-317. The Court, in thus remitting the matter to Congress, stated (332 U.S. at 314-315):

> Congress, not this Court or the other Federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these

> comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

In a 1960 report to Congress, which summarized the results of a study by the General Accounting Office concerning reimbursement of the Government for medical care furnished to those injured through the negligence of third persons, the Comptroller General urged legislation which would enable the Government to recover such costs from tortfeasors. Report of the Comptroller General of the United States, "Review of the Government's Rights and Practices Concerning Recovery of the Cost of Hospital and Medical Services in Negligent Third-Party Cases." See H. R. Rep. No. 1534 87th Cong., 2d Sess., pp. 5, 15. Congress then considered a number of bills, and in 1962 enacted the Medical Care Recovery Act, 42 U.S.C. 2651-2653.

The language of the Act demonstrates that it was Congress' intent to create a separate, distinct, and independent right of recovery in the United States against a tortiously liable third person. For example, 42 U.S.C. 2651(a), which is entitled "Recovery by United States", provides expressly, among other things, that "the United States shall have a <u>right</u> to recover from [a tortiously liable] third person the reasonable value of the care and treatment so furnished or to be furnished and shall, <u>as to this right</u> be subrogated to any right or claim that the injured * * * person * * * has against such third

person to the extent of the reasonable value of the care and treatment so furnished or to be furnished." (Emphasis added.) Thus, under the language of the Act, the United States has a right to recover directly from the tortiously liable third person and is, in addition, subrogated to the injured person's claim of tort liability in order to further implement and protect its right to recovery.

The legislative history of the Act fully confirms the independent nature of the Government's right to recovery. As introduced in the House of Representatives, H.R. 298, the bill which ultimately became the Medical Care Recovery Act, gave the United States a derivative right only. For instance, Section 1(a) of that bill provided only that "the United States shall be subrogated to any right or claim that the injured * * * person * * * has against such third person with respect to the care and treatment so furnished or to be furnished." 108 Cong. Rec. 6669. Hearings were held on H.R. 298, and the bill was reported out by the House Committee on the Judiciary with amendments. 108 Cong. Rec. 6669-6670. Those amendments were in part designed to create in the United States an unequivocal and independent right of recovery. This right was specifically created by adding immediately before the provision regarding subrogation in Subsection (a) new language stating that the United States "shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right," etc.

[then follows the language granting the subrogation remedy]. Indeed, the House Committee's report consistently emphasizes its intent to give the United States an independent right to recover by this language. See H.R. Rep. No. 1534, supra, pp. 2-4.

H.R. 298 was passed by the Senate without further amendment. S. Rep. No. 1945, 87th Cong., 2d Sess., p. 4.

In light of the explicit language of the Act and its legislative history, it is not surprising that the three appellate court decisions passing on the nature of the Government's right to recover under the Act squarely hold that Section 2651(a) gives the United States -- in addition to its subrogation rights -- an independent, non-derivative right to recover.

Indeed, the most recent of these opinions, United States v. Merrigan, 389 F. 2d 21 (C.A. 3), turns on precisely the same issue here presented for decision and is, as discussed more fully infra at p. 12 , in all respects on all fours with the present case. Thus, the opinion reiterates: "Subsection (a) of the Medical Care Recovery Act unmistakably confers on the government what the congressional reports describe as an 'independent right of recovery' from the tortfeasor of the reasonable value of the care and treatment it furnishes to the injured person." 389 F. 2d at 23. Accord: United States v. Fort Benning Rifle and Pistol Club, 387 F. 2d 884 (C.A. 5); Tolliver v. Shumate, _____ W. Va. _____, 150 S.E. 2d 579. See also Government Employees Insurance Co. v. United States, 376 F. 2d 836, 837 (C.A. 4); Maddux v. Cox, 382 F. 2d 119, 123-124 (C.A. 8).

B. 42 U.S.C. 2651(b) Does Not Require The United States To Become A Party To An Action Brought By The Injured Person Within The Six-Month Period In Order To Enforce Its Reimbursement Right.

It is clear from the foregoing that 42 U.S.C. 2651(a) creates an independent, non-derivative right of recovery in the United States. We turn then to the question as to whether Section 2651(b), which is written in permissive terms, cuts down the government's right of action established in Subsection (a). The district court held that the language of Subsection (b) is mandatory rather than permissive, in that it requires the United States to join in any action brought by the injured party within the six-month period or else lose completely its right to recover.

This holding of the district court prohibiting an independent suit by the United States where the injured party has brought his own suit within the six-month period runs contrary both to the wording of the statute and to the purpose of the Act in creating an independent remedy in the United States.

Congress employed the permissive word "may", not the mandatory word "shall", in 42 U.S.C. 2651(b). Thus, under the statute, the United States has an option to intervene or join in an action brought by the injured person within the six-month period, but does not lose the right to maintain an independent action (granted in Section 2651(a)) by failing to exercise this option.

Direct and strong support, confirming the correctness of this position, is found in the Third Circuit's opinion in

United States v. Merrigan, 389 F. 2d 21 (C.A. 3), the only appellate case which directly passed on the question here presented. There, as here, the government furnished medical care to the injured party, who then brought his own suit within the six-month period; final decision in that suit was reached before the government started its own suit. The court of appeals reversed the district court's dismissal of the government's action. It held, 389 F. 2d at 25, upon a complete discussion of the statutory language and the purposes of the Act, that the six-month provision means

> * * * only that the government must wait for six months to afford the injured person the opportunity to bring his action first. When he does sue, the government may intervene at any time, even after the six months period has expired. It may intervene even though the injured person's action was brought after the six months period had run. This leads inescapably to the conclusion that although the government may not bring its independent action until six months have gone by, that period does not mark a kind of partial statute of limitations against the assertion of its independent right of action. It may at any time after six months bring its action even if the injured person has already brought suit for his damages within the six months period. [Emphasis added.]

Accord: United States v. Wittrock, 268 F. Supp. 325 (E. D. Pa.).

2/ Contra: United States v. York, 261 F. Supp. 461 (W. D. Tenn.), which we think was incorrectly decided and which is pending on our appeal to the Sixth Circuit, No. 18,001.

In reaching the contrary result -- without the benefit of the Third Circuit's holding in Merrigan [3/] -- the court below sought to justify its restrictive reading of the Act's provisions by relying on "two basic considerations" (R. 46). But neither of these considerations withstands analysis when measured against the statutory language and purpose. The first of the "considerations" was that "an interpretation permitting the Government to bring its own action after the completion of litigation between the victim and the tort-feasor would unnecessarily subject the latter to multiple litigation." (Ibid.). However, as the Merrigan opinion points out, the statute in other situations clearly contemplates such separate actions by government and injured person against the tortfeasor. For instance, if six months pass without suit by the injured party, the United States may then sue the tortfeasor; after a final judgment in that suit has been handed down, nothing in the Act prevents a separate suit by the injured person. Similarly, if, after the six months had expired, the injured party brought an action against the tortfeasor and recovered a judgment, nothing in the Act would prevent a subsequent suit by the United States. Indeed, the ability to bring such suits separately is a hallmark of the independence of the rights of recovery of the injured person and the United States. "Thus", as the Third Circuit concluded

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3/ Merrigan was decided on January 18, 1968; the district court's opinion in the present case was handed down on December 5, 1967.

in Merrigan, 389 F. 2d at 24-25, "the fundamental purpose of subsection (b) must be something quite different from the prevention of the maintenance of two concurrent actions against the tortfeasor, one by the government for the recovery of the value of medical care and treatment it has furnished and the other by the injured person for the damages inflicted on him." 4/

The second "consideration" assigned by the district court for its result is that under the government's construction of the Act there is "no need or function for the conditional clause which introduces subsection 2651(b)(2). * * * Under the familiar rule of statutory construction that the courts must interpret a statute in a manner which gives meaning to all portions thereof, this court must reject the interpretation urged by the United States." (R. 47).

The district court failed to recognize, however, that the government's interpretation does give significant meaning to this language. The effect of 2651(b)(2), in our view, is to force the United States to wait six months before it may bring

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4/ The opinion of the district court in the present case states that it found no "explicit authorization" in Section 2651(b) for a suit by the United States in the situation presented here. However, as we have demonstrated, supra, at pp. 6-10, the creation of the right, and the concomitant authorization to recover, are found in Section 2651(a), which states explicitly: "* * * [T]he United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished * * *." [Emphasis added.]

an independent action. This allows the injured person to sue first. The legislative history fully supports our construction of the statute. The Comptroller General by letter recommended the addition of this feature to the Act: "The first portion of [an earlier version of 2651(b)(2)] * * * apparently would permit the Government to take immediate action against the liable third person without permitting the injured or diseased person an opportunity to settle the claim himself. * * * The Committee may wish to consider the desirability of including in the bill * * * a provision reserving to the injured or diseased person a specific period of time in which he may attempt to settle the claim." H.R. Rep. 1534, 87 Cong., 2d Sess., at p. 16.

In sum, then, Section 2651(b)(2) under our interpretation does have a very significant effect within the Act's framework. It certainly was not intended, however, to diminish the right of recovery granted by Section 2651(a), other than to require the United States to wait, at most, six months before filing its action. It follows that the district court erred in holding that the United States was barred from bringing the present action.

II

THE DISTRICT COURT ERRED IN REFUSING TO HOLD AS A MATTER OF LAW ON THE PRESENT RECORD THAT THE UNITED STATES WAS ENTITLED TO A JUDGMENT OF $3,275.

The district court, having erroneously ruled that the United States was barred by time from bringing this action, refused to consider the question of whether the Housing Authority

may interpose the defense of the "contributory negligence" of the parents of Carrie Thomas. It is our position that whether or not such "contributory negligence" exists here is irrelevant to the present action, and that on the present record the United States is entitled to recover the stipulated value of the medical care furnished to Carrie Thomas.

The relevant portion of Section 2651(a) states:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment * * * to a person who is injured or suffers a disease * * * under circumstances creating a tort liability upon some third person * * * to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished * * * and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished * * *.

As we have demonstrated above at pp. 6-10 , this language creates an independent right of recovery in the United States. By the plain terms of the statute, this independent liability arises where medical care furnished by the United States to a person who is injured or suffers a disease has been occasioned by the act of a third party which has created a liability in the third person to pay damages for the injury or disease. These straightforward requirements have been admitted or stipulated in the present case. The Housing Authority has agreed that the United States was obligated to supply medical

care and treatment to Carrie Thomas (R. 37), that its negligence proximately caused the injuries of Carrie Thomas, creating a liability to pay damages therefor (R. 36-37), and that the reasonable value of the medical care and treatment furnished to Carrie Thomas by the United States as a result of the injuries was $3,275 (R. 30). It necessarily follows, we submit, that the district court erred, upon the present record, in failing to enter judgment of $3,275 in favor of the United States.

The Housing Authority contended below that under Washington law the parents of a minor child are responsible for the child's medical expenses, and that in any suit brought by the parents to recover such expenses, the parents would be subject to the defense of their own contributory negligence (R. 20). From this statement the Housing Authority argued that the only suit for recovery of medical care expenses of a minor in Washington may be brought by the minor's parents, and that therefore the United States must also be subject to the defense of the parents' contributory negligence.

Even if its statement of the Washington law is correct (which we contest; see footnote 6, infra), the Housing Authority's argument has no merit. The Housing Authority argues that under state law only the parents could have recovered, and that therefore the United States must take subject to defenses which are good against the parents. In a word, the Housing Authority argues that the United States is, at best, subrogated to the rights of the parents to recover under state law.

As we have demonstrated, however, the right of the United States to recover under the Act is an independent right, defined by 2651(a) and not limited to a third party's right to recover under state law. As stated by the Third Circuit in United States v. Merrigan, supra, 389 F. 2d at 24: 5/

> The right of recovery [under the Act] was * * * conferred on the government and subrogation was made one of the remedial consequences of the government's right, a subsidiary equitable remedy, which did not limit the primary right. [Emphasis added.]

Indeed, the present case well illustrates the soundness of Congress' grant of an independent right of recovery to the United States, for the state rule as expressed by the Housing Authority presupposes that the Thomases were initially responsible for Carrie's medical expenses; the real situation, however, was that the United States, and not the parents, was responsible for those expenses because of its obligation to furnish medical care. In short, the Act, in providing an independent remedy to the United States, has done no more than recognize that the United

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5/ Accord: Tolliver v. Shumate, _____ W. Va. _____, 150 S.E. 2d 579, in which the West Virginia Supreme Court of Appeals held that state law as to the accrual of a right of action for medical expenses and the power of the injured person to assign such right of action did not limit the right of the United States to recovery under the Medical Care Recovery Act.

States has incurred certain obligations under federal law to provide medical care and that such federal obligations may displace similar duties under state law. That governmental obligation here did render irrelevant the Thomases' duty under state law to provide medical care for their daughter, and the Act recognizes this fact by granting an independent right of recovery to the United States. 6/

As we have stressed above, on the facts admitted or stipulated in the present record the United States should have been granted judgment as a matter of law for the sum of $3,275. To hold otherwise would penalize the United States for actions not its own, and would give a windfall to the Housing Authority, relieving it from damages on account of an injury for which, it has admitted, it was legally responsible.

6/ Nor would the result differ under the law of Washington. That state's law makes it clear that where "* * * [T]he action for wrongful death or injury to a child] is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will of course bar a recovery." Hilstad v. City of Seattle, 149 Wash. 483, 271 P. 264, 265 (quoting from Gregg v. King County, 80 Wash. 196, 141 P. 340, 344; emphasis added). See McCandless v. Inland Northwest Film Service, Inc., 54 Wash. 2d 523, 392 P. 2d 613 (action by parents for wrongful death of child); Cox v. Hugo, 52 Wash. 2d 815, 329 P. 2d 467 (action by parents for medical expenses). The rationale of such cases is clearly that the parents should not benefit by their own wrong. Just as clearly, the defense of the contributory negligence of the parents would not be available to a defendant where the parents had not brought the suit for their own benefit. This, of course, is the situation here. See, e.g., Vioen v. Cluff, 59 Wash. 2d 306, 418 P. 2d 430, in which the defense of the contributory negligence of the parents was held unavailable to the defendant because the suit, which specifically included a request for special damages in addition to general damages (see 418 P. 2d at 432), was brought by the child (through his parent as guardian ad litem).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court be reversed, and this cause be remanded with instructions to enter a judgment in favor of the United States in the sum of $3,275.

Respectfully submitted,

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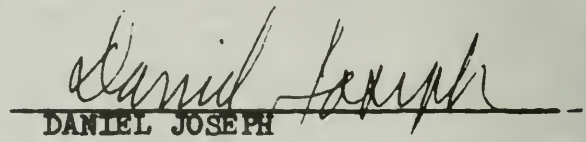
JULY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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AFFIDAVIT OF SERVICE

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

DANIEL JOSEPH, being duly sworn, deposes and says:

That on July 10, 1968, he caused one copy of the foregoing Brief for Appellant to be served by air mail, postage prepaid, upon counsel for appellee:

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Subscribed and sworn to before me
this 10th day of July, 1968.

[seal]

NOTARY PUBLIC

My Commission expires April 14, 1972.